

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 35

FISCAL
NOTE

BY SENATOR WOELFEL

[Introduced January 10, 2018; Referred
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §55-19-1, §55-19-2, §55-19-3, §55-19-4, §55-19-5, §55-19-6 and §55-19-7,
 3 all relating to requiring presuit mediation for civil actions filed in circuit courts; allowing
 4 tolling of statutes of limitations pending presuit mediation; setting forth the substance of
 5 any demand for mediation and the substance of the response; providing for the selection
 6 of mediators; requiring the West Virginia State Bar to appoint mediators under certain
 7 circumstances; outlining the mediation procedure; and including penalties for failing to
 8 demand presuit mediation.

Be it enacted by the Legislature of West Virginia:

ARTICLE 19. PRESUIT MANDATORY MEDIATION.

§55-19-1. Legislative purpose

1 The Legislature recognizes that civil actions have a significant negative impact on the
 2 economy of West Virginia, and cause significant tax dollars to be allocated to the judicial branch
 3 of government to resolve the civil actions. It is the public policy of this state to encourage voluntary
 4 resolutions and compromise of legal disagreements that arise between its citizens and persons
 5 who do business in this state. Mediation offers, in many instances, a more efficient and cost-
 6 effective alternative to court litigation. Furthermore, mediation does not impact a person's
 7 procedural rights and safeguards as does traditional litigation. Mediation will preserve these rights
 8 as mediation will remain a fair and viable alternative to court litigation, and will guarantee that no
 9 person is unfairly prejudiced by agreeing to mediation. The Legislature believes that providing a
 10 means to allow presuit resolution, without limiting a person's constitutional, statutory and
 11 regulatory rights, is in the best interest of the citizens of this state and its public welfare.

§55-19-2. Definitions.

1 As used in this article:

2 "Mediator" means an individual agreed upon or appointed to assist in facilitating persons
 3 to reach a voluntary settlement agreement.

4 "Person" means an individual, corporation, business trust, estate, trust, partnership,
5 limited liability company, association, joint venture or any other legal or commercial entity.

§55-19-3. Demand for mediation.

1 (a) Prior to filing a civil action in any circuit court in the State of West Virginia, a person is
2 required to provide a demand for mediation upon those persons who the person providing the
3 demand for mediation reasonably believes will be a party in a civil action and is responsible for
4 any damages sought at the mediation and any subsequent civil action.

5 (b) The demand for mediation shall be made by certified mail, return receipt requested. If
6 the person making the demand has knowledge the person who will receive notice of a demand
7 for mediation is represented by an attorney, the request for mediation shall also be mailed by
8 certified mail, return receipt requested to the person's attorney.

§55-19-4. Statutes of limitation periods tolled.

1 The service of a demand for mediation tolls any applicable statutes of limitation if service
2 of the demand is mailed by certified mail, return receipt requested, prior to the expiration of the
3 applicable statute of limitation. Any applicable statutes of limitation shall then be tolled for either;

4 (1) Fifteen working days after the occurrence of the mediation, or

5 (2) Fifteen days after the expiration of the person's response time, required by section five
6 of this article.

§55-19-5. Content for the demand for mediation and response; failure to respond.

1 (a) The demand for presuit mediation shall be in writing, and shall contain the following
2 items:

3 (1) The identity of the person making the claim, whether the person is represented by
4 counsel, and all relevant parties to the mediation known to the demanding person;

5 (2) A description of the specific nature of the dispute to be mediated along with a general
6 description of the location, date, time and factual dispute giving rise to the dispute; and

7 (3) The deadline for responding to the demand for presuit mediation.

8 (b) If the person receiving the demand fails to respond to the demand for presuit mediation
9 within the period provided, or otherwise fails to participate in a good faith mediation, then a suit in
10 a court of competent jurisdiction may be filed against the receiving person without further notice.

11 (c) A person receiving a demand for presuit mediation shall respond to the demand within
12 twenty days of the date of service of the demand. The responding person shall note receipt and
13 acceptance of the demand and generally state if the responding person agrees to the demand or
14 accepts the settlement offer, and if not, the person's position and legal defenses to the dispute
15 which are reasonably known to the person at the time of his or her response.

16 (d) Failure to respond to a demand for presuit mediation subjects the person to litigation
17 without further notice.

§55-19-6. Procedure for mediation; confidentiality of information presented in mediation.

1 (a) Within ten working days after the response to the demand for mediation is received,
2 the persons shall meet and confer, and agree upon a mediator. Should the persons fail to agree
3 upon a mediator, the persons shall jointly write the West Virginia State Bar within three working
4 days and request it appoint a mediator. The West Virginia State Bar shall appoint a mediator and
5 advise the persons, in writing, of the mediator selected to preside as mediator in the matter
6 presented. This shall occur within ten working days of the receipt of the letter by the West Virginia
7 State Bar. Any question of a mediator's qualification is governed by Rule 25.07 of the West
8 Virginia Trial Court Rules. Any person acting as mediator has immunity in the same manner and
9 to the same extent as a circuit judge.

10 (b) Unless otherwise agreed between the persons to be involved in the mediation,
11 mediation shall occur within thirty working days after the selection of a mediator. Unless otherwise
12 agreed upon, the mediation shall take place within the jurisdiction of the circuit court which has
13 jurisdiction over the dispute. All persons shall attend and participate in the mediation in a manner
14 set forth in Rules 25.10 and 25.11 of the West Virginia Trial Court Rules.

15 (c) No later than five days prior to mediation, the persons involved in the mediation shall

16 provide a mediation report to the mediator and all persons involved in the mediation, which shall
17 provide information addressing the person's position on liability, defenses to liability and
18 damages, along with the identity of any documents and witness which will support their respective
19 positions and reasonably known to the persons at the time of the mediation report.

20 (d) Mediation shall be regarded as confidential settlement negotiations, subject to Rule
21 408 of the West Virginia Rules of Evidence. The mediator may not be subpoenaed or called to
22 testify or otherwise be subject to process requiring disclosure of confidential information in any
23 proceeding relating to or arising out of the dispute mediated. Any information or evidence
24 discussed in a person's mediation statement or at mediation pursuant to this section is not
25 admissible in any subsequent civil action for any reason: *Provided*, That the persons involved in
26 the mediation who then become parties in a civil action may request the evidence and information
27 in a manner consistent with the West Virginia Rules of Civil Procedure and use at trial in a manner
28 consistent with the West Virginia Rules of Evidence. No mediation statement may be admitted as
29 evidence at trial or presented as argument to the jury for any reason.

30 (e) The failure of any person to respond to a demand or response, to agree upon a
31 mediator, to make payment of fees and costs within the time established by the mediator, or to
32 appear for a scheduled mediation session without the approval of the mediator, constitutes the
33 failure or refusal to participate in the mediation process and operates as an impasse in the presuit
34 mediation by that party, entitling the other party to proceed in court and to seek an award of the
35 costs and fees associated with the mediation. Additionally, notwithstanding any other law, persons
36 who fail or refuse to participate in the mediation process may not recover attorney's fees and
37 costs in subsequent litigation relating to the dispute. If mediation cannot be scheduled and
38 conducted within ninety days after the demand to participate in mediation was filed, an impasse
39 has occurred unless both parties agree to extend this deadline.

40 (f) If an agreement is reached, it shall be reduced to writing and it becomes a binding and
41 enforceable agreement consistent with West Virginia common law.

42 (g) Unless otherwise agreed to by the parties, the parties shall share the costs of presuit
43 mediation equally.

44 (h) If mediation is not successful in resolving all issues between the parties, the parties
45 may file the unresolved dispute in a court of competent jurisdiction.

§55-19-7. Exclusions to requirement to participate in mediation.

1 This article does not apply to actions:

2 (1) Subject to the presuit notice requirements found in article seventeen of this chapter;

3 (2) Brought pursuant to the Medical Professional Liability Act, §55-7B-1 et seq. of this
4 code;

5 (3) Filed by the State of West Virginia and its agencies, or any political subdivision as
6 defined in §29-12A-1 et seq. of this code;

7 (4) Filed pursuant to Rule 23 of the West Virginia Rules of Civil Procedure and;

8 (5) Involving a dispute subject to an arbitration provision or agreement.

NOTE: The purpose of this bill is to require mediation to occur prior to filing most civil actions.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.